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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MPH TECHNOLOGIES OY,

Plaintiff,

vs.

APPLE INC.,

Defendant.

Case No. 3:18-cv-05935-TLT

**MPH TECHNOLOGIES OY'S
REPLY IN SUPPORT OF
PARTIALLY AGREED MOTION
FOR LEAVE TO AMEND
INFRINGEMENT CONTENTIONS**

Date: March 19, 2024
Time: 2:00 P.M.
Place: San Francisco Courthouse,
Courtroom 9
Judge: Hon. Trina L. Thompson

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1 **I. INTRODUCTION**

2 Apple relies on documents as giving MPH notice of Apple’s proposed claim constructions that
 3 either have *nothing* to do with the constructions on which MPH’s motion is based or expressly state
 4 that they are *not* intended to reflect Apple’s claim construction positions. In short, Apple cannot
 5 justifiably deny that MPH exercised diligence after it became aware of Apple’s proposed claim
 6 constructions through Apple’s local patent rule disclosures and Apple’s Responsive Claim
 7 Construction brief. The fact is that MPH acted diligently by moving to amend even *before* the Court
 8 issued its order adopting some of Apple’s proposed constructions and construing “intermediate
 9 computer” differently from the parties’ proposed constructions.

10 Apple also identifies no prejudice apart from vague and non-specific speculation that is
 11 insufficient under the case law. No prejudice exists because MPH provided a draft of its proposed
 12 amendments *nearly a year* prior to the close of discovery, before any party depositions have taken
 13 place, and the amendments will not disrupt the case schedule.

14 **II. MPH’S REQUEST FOR RELIEF**

15 MPH filed its motion on December 1, 2023, a month before the Court’s Order Construing
 16 Claims, ECF No. 109. MPH sought amendment based on claim constructions proposed by Apple for
 17 the “secure” terms, “unique identity,” the “key exchange” terms, and “intermediate computer” in case
 18 the Court adopted one or more of Apple’s constructions. *See* ECF No. 103 at pp. 5–9. The relief sought
 19 by MPH is slightly changed as a result of the Court’s claim construction rulings.

20 First, the Court adopted Apple’s constructions of the “secure” terms and “unique identity.” ECF
 21 No. 109 at pp. 4, 6. Thus, the contingency in MPH’s motion has come to fruition—the Court adopted
 22 Apple’s proposed constructions of these terms. Thus, MPH maintains its request to amend its
 23 contentions to assert infringement under the Doctrine of Equivalents (“DOE”) under the Court’s
 24 constructions. Contrary to Apple’s mischaracterization of MPH’s DOE positions, ECF No. 110 at p. 2,
 25 MPH seeks to amend its contentions to assert that Apple’s security protocol is the equivalent of “secure
 26 connection,” “secure forwarding,” and “secure message.” MPH also seeks to assert that the tokens used
 27 by the accused Apple instrumentalities are equivalent to the claimed “unique identity.”

28 Second, the Court adopted MPH’s constructions of the “key exchange” terms. *Id.* at pp. 8, 10.

1 Thus, MPH notified Apple that it viewed its motion as moot for these terms because MPH maintains
 2 that Apple literally infringes under the Court's constructions. Ex. G, Jan. 5, 2024 email. Apple refused
 3 to agree unless MPH withdrew "its DOE contentions for those terms with prejudice and will not reassert
 4 them later in this case under any circumstances" while reserving its right to appeal the Court's
 5 constructions. Ex. H, Jan. 8, 2024 (12:05 PM CT) email. Thus, MPH informed Apple that it now
 6 maintains its request to amend its contentions to assert DOE infringement for Apple's constructions of
 7 the "key exchange" terms to preserve its own rights. Ex. I, Jan. 8, 2024 (7:25 PM CT) email.

8 Third, the Court adopted its own construction of "intermediate computer." ECF No. 109 at p.
 9 13. MPH now seeks leave to amend its literal infringement contentions to address the Court's
 10 requirement that the intermediate computer is "at least one intermediate computer that individually
 11 satisfies each recited requirement on the intermediate computer" and provide its contention regarding
 12 whether the accused instrumentalities are comprised of a single or multiple devices under the Court's
 13 construction. MPH also seeks to add an alternative DOE theory of infringement to the extent the
 14 accused instrumentalities do not literally meet the Court's requirement of "at least one intermediate
 15 computer that individually satisfies each recited requirement on the intermediate computer." MPH
 16 informed Apple of its intention to modify the relief requested by its motion and its basis for doing so.
 17 Ex. G, Jan. 5, 2024. Apple refused to withdraw its objections. Ex. H, Jan. 8, 2024 (12:05 PM CT) email.

18 Finally, MPH's motion also sought leave to add Apple's recently released products to its
 19 contentions. Apple does not oppose MPH's motion on that basis. *See* ECF No. 110 at 14 n. 5.

20 **III. MPH DID NOT KNOW APPLE'S FINAL CLAIM CONSTRUCTIONS POSITIONS
 21 UNTIL THE JOINT CLAIM CONSTRUCTION STATEMENT AND, FOR
 22 "INTERMEDIATE COMPUTER," UNTIL THE HEARING**

23 Apple relies on documents that, even under its strained reading, at best only "implicitly" put
 24 MPH on notice of its claim construction positions before the Patent L.R. 4-2 and 4-3 disclosures. *See*
 25 ECF No. 110 at pp. 8–11. But, *none* of the cited papers notified MPH of Apple's proposed
 26 constructions, even "implicitly." Some of the documents expressly told MPH *not to* rely on them.

27 Apple is grasping at straws by relying on a February 18, 2017 *pre-suit* letter to argue that MPH
 28 was on notice of any claim construction positions before filing suit. *See* ECF No. 110 at p. 10. MPH
 could not have anticipated Apple's claim constructions based on that letter, which contains nothing

1 more than naked denials of infringement, let alone cognizable claim construction arguments that Apple
 2 sought in this case. Nothing in the letter mentions IPSec or SPI values, or anything about how Apple
 3 interpreted the key exchange terms or intermediate computer. *See, generally*, ECF No. 110-3.

4 Apple also relies on the IPR proceedings for the '494 patent as "implicitly" putting MPH on
 5 notice of its proposed constructions of the "secure" terms and "unique identity." As discussed during
 6 the claim construction briefing, Apple took materially different positions on claim construction during
 7 the IPRs than the ones it has taken in this case. The footnote Apple relies on from MPH's IPR Patent
 8 Owner Response does not show that Apple would seek to limit "secure connection," "secure
 9 forwarding," and "secure message" across all of the patent claims in the '949 family patents to "IPSec"
 10 in this litigation. On the contrary, that footnote only refers to Apple's argument that "secure connection"
 11 be construed as "one or more security associations" for the '949 patent (IPR2019-00824), a construction
 12 that differs from Apple's construction in this case for "secure connection" ("IPSec Connection"), which
 13 the Court adopted. ECF No. 109 at p. 4. Apple also did not ask for *any* construction of "secure
 14 forwarding" or "secure message" during the IPRs. *See* Ex. J, '494 IPR Petition at p. 18.

15 Apple also did not contend in the IPRs that "unique identity" should be construed as "one or
 16 more SPI values," as it did in this case. *Id.* Instead, it proposed a broader construction ("one or more
 17 parameters that uniquely identify a secure connection"), as Apple conceded in its claim construction
 18 brief, ECF No. 98 at p. 10 n. 6, and the Court acknowledged in its Order, ECF No. 109 at p. 7. MPH
 19 could not have anticipated that Apple would seek a narrower construction in this case.

20 Apple also relies on its June 2023 invalidity contentions as "confirm[ing]" its position that
 21 certain claim terms should be limited to IPSec. But those, too, were insufficient to put MPH on notice
 22 of Apple's proposed constructions of the "secure" terms and "unique identity" that were adopted by
 23 the Court. Notably, *Apple expressly instructed MPH not to rely on its invalidity contentions* for claim
 24 construction, stating "[t]hese Contentions are not intended to reflect Apple's claim construction
 25 positions, which will be disclosed in due course in accordance with the case schedule." Ex. K, at p. 2.
 26 Moreover, Apple's contentions included 37 claim charts comprising over 1,000 pages. ECF No. 110 at
 27 pp. 9–10. To assert that MPH had any meaningful notice of Apple's claim constructions based on that
 28 massive disclosure "in June 2023" is an overstatement at best, given Apple's representation that the

1 disclosure is not intended to reflect Apple’s claim construction positions. Not surprisingly, multiple
 2 references cited in Apple’s contentions had no disclosure on IPSec or SPI values, and could not have
 3 reflected Apple’s later claim construction positions, “implicitly” or otherwise. *See, e.g.*, Exs. L–N,
 4 Excerpts from Apple’s invalidity charts.

5 Apple’s interrogatory answer on infringement also provided MPH no notice. It included only
 6 bare denials of infringement, devoid of claim constructions of the disputed terms. Akin to Apple’s
 7 invalidity contentions, this interrogatory answer told MPH to wait for Apple’s claim construction
 8 positions at a later time “in accordance with Patent Local Rule 4.” *See* ECF No. 110-6 at p. 6.

9 Thus, the *earliest* possible date when MPH could have notice of Apple’s positions on the
 10 “secure” terms, “unique identity,” or the “key exchange” terms was on August 3, 2023, when Apple
 11 provided its Patent L.R. 4-2(a) disclosure. But even then, Apple insisted that its positions were
 12 “preliminary,” subject to later finalization in the Joint Claim Construction and Prehearing Statement
 13 (“JCC Statement”), filed on August 28, 2023. ECF No. 92. Apple reserved “the right to amend, modify,
 14 or supplement its proposed constructions, including, but not limited to, in response to MPH’s proposed
 15 claim constructions, as a result of the meet-and-confer process...” ECF No. 110-8 at 2. Indeed, the rule
 16 encourages the parties to narrow the issues by changing constructions and eliminating terms from the
 17 list. Patent L.R. 4-2(c). That Apple did not change its positions on “secure connection” or “unique
 18 identity,” for example, from the Patent L.R. 4-2 date to the Patent L.R. 4-3 date is irrelevant. At the
 19 time of the Patent L.R. 4-2 disclosures, MPH did not know what terms Apple would pursue or whether
 20 it would modify its constructions based on Apple’s reservation. Apple did not formally solidify its
 21 positions on the final list of 10 terms and its proposed constructions until the Patent L.R. 4-3 deadline,
 22 when the parties submitted the JCC Statement on August 28, 2023 after negotiations. *See, e.g.*, Ex. A,
 23 Aug. 17–25, 2023 email exchanges between counsel. Even the cases that Apple relies on measured
 24 diligence from the joint claim construction date. *Karl Storz Endoscopy-Am., Inc. v. Stryker Corp.*, 2016
 25 WL 7386136, at *1, *4 (N.D. Cal. Dec. 21, 2016) (measure diligence from date parties submitted Patent
 26 L.R. 4-3 joint claim construction statement “at which time both parties became aware of the claim
 27 constructions advocated by the opposing party”); *Looksmart Grp., Inc. v. Microsoft Corp.*, 2019 WL
 28 462987, at *3 (N.D. Cal. Feb. 6, 2019) (“[T]he Court will measure [] diligence from [] the date the

1 parties submitted their joint claim construction statement.”).

2 Moreover, Apple changed its positions *after* the JCC Statement, proposing a new construction
 3 of “intermediate computer” in its November 2, 2023 responsive claim construction brief. Apple initially
 4 argued that “intermediate computer” was “*one* intermediate computer (not a system of computers).” In
 5 its responsive brief, Apple argued for the first time that it be construed as “*at least one* intermediate
 6 computer that individually satisfies each recited requirement on the intermediate computer.” ECF No.
 7 98 at p. 23. And Apple then changed that new construction further at the December 10, 2023 *Markman*
 8 hearing when it argued that its construction requires *one individual device*—not just one individual
 9 computer—to satisfy all the claimed requirements, as the Court noted in its Order. ECF No. 109 at p.
 10 13. The Court ultimately adopted a construction neither party had proposed. *Id.*

11 **IV. MPH ACTED DILIGENTLY TO PREPARE AND SERVE ITS DOE CONTENTIONS
 12 AFTER BECOMING AWARE OF APPLE’S PROPOSED CONSTRUCTIONS**

13 Cases from this district reflect the highly factual underpinnings that determine due diligence
 14 under Patent L.R. 3-6(a). Based on their unique factual circumstances, some measure diligence from
 15 the date on which a party received an opposing party’s proposed constructions and others measure
 16 diligence from the claim construction order date. Apple asks the Court to adopt a “one-size-fits-all”
 17 approach. For one, it entirely ignores the latter interpretation of Patent L.R. 3-6(a) because MPH’s
 18 diligence cannot be disputed as MPH moved to amend *before* the Court’s claim construction order.
 19 ECF No. 103.

20 Even applying the cases that measured diligence from when the movant was first put on notice
 21 of an adverse party’s claim constructions, MPH acted with diligence. MPH (1) put Apple on notice of
 22 MPH’s intent to amend merely *days* after the parties finalized their claim constructions; (2) served a
 23 detailed draft of its amended contentions only two months later, addressing 5 technically complex
 24 patents, requiring analyses of technical documents, and requiring revisions after Apple changed its
 25 construction of “intermediate computer” in its responsive claim construction brief; and (3) moved to
 26 amend days after Apple stated its opposition to MPH’s request, before the claim construction hearing
 27 and over a month before the Court’s claim construction. Not surprisingly, Apple has not cited a single
 28 case in which a court denied a motion for leave to amend contentions on the basis of claim construction

1 *that was filed before the court even issued its claim construction order*, let alone did so based on
 2 anything similar to the facts of this case.

3 **A. Amendment to Add a Theory of Infringement Under the Doctrine of Equivalents is Not
 4 Subject to Higher Standard of Diligence Under the Rules**

5 Apple contends that DOE theories of infringement are due at the time a party serves its initial
 6 infringement contentions under Patent L.R. 3-1(e). ECF No. 110 at p. 9. Apple’s position that a DOE
 7 theory can never be added based on an opposing party’s proposed constructions or unanticipated claim
 8 construction rulings is simply wrong. Patent L.R. 3-6 permits amendment upon a showing of good
 9 cause, including a court’s claim construction, without limitation on the types of amendments allowed.
 10 *Apple Inc. v. Samsung Elecs. Co.*, 2013 WL 3246094, at *5–9 (N.D. Cal. June 26, 2013) (finding good
 11 cause to *add* multiple DOE theories based on court’s claim constructions).

12 Apple’s argument necessarily requires that a party must guess every conceivable way a claim
 13 limitation might be construed before even learning an opposing party’s claim construction proposals,
 14 and then address infringement, whether literal or DOE, under every potential construction at the outset
 15 of the case. The rules don’t require that much, and Apple has not cited any case that holds otherwise.
 16 *See Radware Ltd. v. F5 Networks, Inc.*, 2014 WL 3728482, at *2 (N.D. Cal. Jan. 1, 2014) (“[T]he
 17 expectation that a patentee would have a precise sense of its infringement theory at the outset is
 18 unrealistic …”) (cleaned up). In fact, a party’s attempt to inject an “unforeseeable” claim construction
 19 requirement into the diligence assessment was squarely rejected in *Impinj, Inc. v. NXP USA, Inc.*, 2022
 20 WL 2125135, at *4 (N.D. Cal. Jan. 14, 2022). *See also Cellspin Soft, Inc. v. Fitbit, Inc.*, 2021 WL
 21 4923380, at *2 (N.D. Cal. Aug. 10, 2021) (“It is not clear to the Court—and Plaintiff cites no authority
 22 in support—that a party must anticipate all potential definitions of a term, including those not raised by
 23 a litigant.”).

24 Apple’s cases mostly addressed untimely DOE theories based on an opposing party’s ***non-***
 25 ***infringement*** positions or the discovery of other publicly available information. They do not address
 26 whether an adverse party’s disclosure of ***claim construction*** positions ***after*** service of initial
 27 contentions or an unanticipated claim construction by the Court can support good cause to amend, as
 28 is the case here. As explained above, none of Apple’s claim construction positions were made known

1 to MPH until, at the earliest, Apple provided its Patent L.R. 4-2 disclosure on August 3, 2023. But even
 2 those constructions were subject to change based on the patent rule exchanges that came after, and *did*
 3 change as late as Apple's responsive claim construction brief and the *Markman* hearing.

4 In *Nitride Semiconductors Co. v. RayVio Corp.*, 2018 WL 4214983 (N.D. Cal. Aug. 6, 2018),
 5 the plaintiff moved for amendment *after* the Court's claim construction order and *the close of discovery*.
 6 *Id.* at *4. And it did not move on the basis of the defendant's proposed constructions or those adopted
 7 by the court as is the case here. *Id.* at *3–4. While the plaintiff later argued that its proposed amendments
 8 were also justified by the court's construction, the court found that its *Markman* order did not support
 9 good cause because the plaintiff failed to make that argument in the parties' joint discovery statement,
 10 and because the court adopted the defendant's construction proposed more than seven months *before*
 11 plaintiff's motion. Here, MPH moved to amend shortly after learning of Apple's positions by promptly
 12 putting Apple on notice of its intent to amend its contentions to assert DOE, and by providing Apple
 13 its proposed amendments *before* the Court's claim construction order and the close of fact discovery.

14 In *Fujifilm Corp. v. Motorola Mobility, LLC*, 2015 WL 757575 (N.D. Cal. Feb. 20, 2015), the
 15 court denied a leave to add a DOE theory *after* the close of discovery. *Id.* at *7. Apart from blaming
 16 deficiencies in the defendant's prior non-infringement contentions, the plaintiff provided no
 17 explanation of why those theories could not have been reasonably asserted earlier. *Id.* at *8. Here,
 18 MPH's basis for amendment is not Apple's vague non-infringement assertions, but Apple's proposed
 19 constructions which MPH could not have anticipated earlier in the case and the Court's claim
 20 construction order. Notably, the *Fujifilm* plaintiff asserted a second ground for amendment under Patent
 21 L.R. 3-6(a) which was based on claim construction positions raised by the defendant in its summary
 22 judgment motion. *Id.* at *7. The court recognized that “[t]here is some force to” that argument because
 23 Patent L.R. 3-6(a) permits a finding of good cause where terms are construed “in a manner that is
 24 materially ‘different from that proposed by’ [the plaintiff].” *Id.* at *8. Although the court ultimately
 25 found this argument moot based on its summary judgement ruling, *id.*, this shows that even *Fujifilm*,
 26 which Apple contends is “instructive,” discerned a difference between seeking leave to amend based
 27 on non-infringement positions containing no new information (do not support good cause) versus
 28 seeking to amend based on newly raised and adopted claim constructions (support good cause).

1 Similarly, *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, 236 F. Supp. 3d 1110 (N.D. Cal.
 2 2017) denied leave to add new DOE theories based on the opposing party’s service of non-infringement
 3 contentions, which disclosed no previously unknown information. *Id.* at 1114–16; *see also O2 Micro*
 4 *Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006) (affirming district court’s
 5 denial of motion to amend filed *after* close of discovery and which relied on documents produced 15
 6 months prior to motion and deposition testimony from 3 months prior to motion).

7 Apple’s reliance on an order from its lawsuit in *Samsung Elecs.*, 2013 WL 3256094, is
 8 misplaced because leave to add DOE contentions was denied where the contentions were “not based
 9 on new discovery or claim construction,” but, instead, like the above cases, based on non-infringement
 10 positions. *See* ECF No. 110 at p. 8. Notably, Apple ignores the portions of the order in which the court
 11 *allowed* amendments to *add* multiple DOE theories based on the court’s recent claim constructions.
 12 *Samsung Elecs.*, 2013 WL 3246094, at *5–6.

13 Finally, *Uniloc 2017 LLC v. Apple, Inc.*, 2019 WL 8810168 (N.D. Cal. Dec. 16, 2019) was
 14 decided on a motion to strike and held that boilerplate contentions did not meet the standard of Patent
 15 L.R. 3-1. ECF No. 110 at 6. MPH is not relying on boilerplate DOE contentions, and has provided
 16 Apple with a detailed draft of its DOE theories using Apple’s proposed claim constructions.

17 MPH asserted literal infringement in its infringement contentions, and reserved the right to later
 18 add infringement under the DOE, because it had a good faith belief that all asserted claims were *literally*
 19 infringed under its proposed constructions. Now, MPH has acted with diligence to assert infringement
 20 under the DOE upon learning of Apple’s constructions, and upon the Court’s adoption of some of
 21 Apple’s constructions as well as the Court’s own construction of “intermediate computer.”

22 **B. MPH Exercised Diligence Under Patent Local Rule 3-6(a)**

23 The Patent Local Rules provide that “[a] claim construction by the Court different from that
 24 proposed by the party seeking amendment” is a circumstance that may support a finding of good cause
 25 to amend, absent undue prejudice to the non-moving party. Patent L.R. 3-6(a). This is precisely the
 26 case here because the Court adopted Apple’s proposed constructions of the terms “secure connection,”
 27 “secure forwarding,” “secure message,” and “unique identity,” and adopted its own construction of
 28 “intermediate computer.” *See* ECF No. 109. Apple’s dismissal of the cases cited by MPH on the basis

1 that they arise from “unanticipated claim construction rulings” is an incorrect overstatement, and also
 2 neglects that the Court *did* adopt its own construction of “intermediate computer.”

3 In *ChriMar Sys. Inc. v. Cisco Sys., Inc.*, 2015 WL 13449849 (N.D. Cal. May 14, 2015), which
 4 Apple failed to address, the court found diligence in moving to amend within a month of the court’s
 5 claim construction order even though plaintiff had the defendants’ proposed constructions “years ago”
 6 and the court’s tentative constructions “more than fourteen months ago.” *Id.* at *3–5. Rejecting
 7 defendant’s argument that the plaintiff must establish that it acted with diligence from the time it
 8 received the proposed claim constructions, the court stated that “Rule 3-6(a) does not require a party to
 9 seek leave to amend prior to issuance of the final claim construction order.” *Id.* at *4. Even in the cases
 10 where the court adopted a different claim construction than either party’s proposal, the court expressly
 11 stated that the outcome would have been the same even had the adopted claim construction been first
 12 proposed by the opposing party because Patent L. R. 3-6(a) “imposes no different standard when the
 13 different claim construction was first proposed by the opposing party.” *Emblaze Ltd. v. Apple Inc.*, 2013
 14 U.S. Dist. LEXIS 132169, at *5–6 (N.D. Cal. Sept. 12, 2013) (no Westlaw cite); *GPNE Corp. v. Apple*
 15 *Inc.*, 2013 WL 6157930, at *2 (N.D. Cal. Nov. 22, 2013) (“GPNE could not have anticipated the full
 16 scope of the amendments needed without the court’s claims construction order....”); *PersonalWeb*
 17 *Techs. LLC v. GitHub Inc.*, 2016 WL 3519292 (N.D. Cal. June 28, 2016) (measuring diligence from
 18 Court’s claim construction order and finding diligence where motion filed 2.5 months after order).

19 Apple’s attempt to distinguish these cases as involving “unanticipated [] rulings” also fails
 20 because it cannot deny that the Court adopted a construction of “intermediate computer” that neither
 21 party proposed. *See* ECF No. 110 at 12. Nor can it deny that the Court’s construction *is* materially
 22 different as it adopts wording not proposed by either party (“wherein a computer can be comprised of
 23 multiple devices”) and a portion of Apple’s construction¹ that showed up for the first time in its
 24 responsive brief **on November 2, 2023**, only weeks before MPH served Apple with amended
 25 contentions, and less than a month before MPH filed this motion. ECF No. 98. MPH was more than
 26

27 ¹ Apple all but concedes the Court’s construction is different from the parties’ proposals. Thus, Apple’s
 28 argument is really directed to whether the Court’s construction was “foreseeable,” but there is no
 authority requiring a moving party to show that a construction was unforeseeable. *Impinj*, 2022 WL
 2125135, at *4; *Cellspin Soft*, 2021 WL 4923380, at *2.

1 diligent in moving to amend within weeks of Apple proposing its new construction during the claim
 2 construction briefing. *Asetek Danmark A/S v. CoolIT Sys. Inc.*, 2020 WL 6562319, at *4 (N.D. Cal.
 3 Nov. 9, 2020) (finding diligence where opposing party changed construction mid-briefing); *Tech.
 4 Props. Ltd. LLC v. Canon, Inc.*, 2016 WL 1360756, at *4 (N.D. Cal. Apr. 6, 2016) (diligence where
 5 party moved to amend one month after claim construction order).

6 Courts have reached different conclusions based on specific facts of their cases on whether to
 7 measure diligence from the date of an adverse claim construction order or from when a moving party
 8 knew about the proposed constructions. But, even the courts that have applied the more stringent “date-
 9 of-disclosure” standard have not required “that the moving party [] draft its proposed amendments the
 10 very next day [upon receiving those constructions]; but a diligent party would prepare so that it would
 11 be ready to respond expeditiously to the court’s issuance of an adverse claim construction order.” *Via
 12 Techs., Inc. v. Asus Comp. Int’l*, 2017 WL 396172, at * 3 (N.D. Cal. Jan. 30, 2017). MPH did precisely
 13 that here, and even moved for leave to amend *before the Court issued its claim construction order* to
 14 provide Apple with even more notice of its DOE positions.

15 Unsurprisingly, Apple **has not cited a single case** in which a court denied a motion for leave in
 16 which a party moved to amend based on proposed constructions *prior to issuance of the claim
 17 construction order*. See *Verinata Health, Inc. v. Sequenom, Inc.*, 2014 WL 789197, at *2 (N.D. Cal.
 18 Feb. 26, 2014) (no diligence where party waited *over a year* from when it learned of proposed
 19 constructions that formed basis for amendments and over *3 months after* the court adopted them to file
 20 motion to amend); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l., Inc.*, 2013 WL 4604206,
 21 at *4 (N.D. Cal. Aug. 28, 2013) (no diligence where party waited 2 months to file motion *after* claim
 22 construction order adopting claim constructions which opposing party proposed *seven months* prior to
 23 motion); *Looksmart Group.*, 2019 WL 462987, at *3 (no diligence in filing motion *after* claim
 24 construction order and *six-and-a-half months* after joint claim construction submission); *EON CorpIP
 25 Holdings LLC v. Aruba Networks Inc.*, 2013 WL 6001179, at *2 (N.D. Cal. Nov. 12, 2013) (no
 26 diligence in filing motion 3 months *after* claim construction order and “nearly a year” after receiving
 27 defendant’s constructions).

28 Here, there can be no question that MPH exercised diligence even if diligence is measured from

1 Apple's August 8, 2023 disclosure of preliminary claim constructions. Apple claims that MPH did not
 2 exercise diligence in amending by waiting 110 days after receiving Apple's Patent L.R. 4-2 disclosures,
 3 more than 2 months after it had informed Apple that it planned to serve them, and 2 months after Apple
 4 followed up on their status. Apple ignores the time spent to ascertain the impact of Apple's positions
 5 and in preparing detailed DOE analyses. In any event, courts have rarely found such short timeframes
 6 as showing a lack of diligence. *Radware*, 2014 WL 3728482, at *2 (finding three months diligent);
 7 *Nuance Commc'ns, Inc. v. Abbyy Software House*, 2012 WL 2427160, at *2 (N.D. Cal. June 26, 2012)
 8 (finding a "few months" diligent); *Vasudevan Software, Inc. v. Int'l Bus. Machs. Corp.*, 2011 WL
 9 940263 at *3–4 (N.D. Cal. Feb. 18, 2011) (finding four months diligent).

10 MPH acted diligently by investigating potential amendments to its contentions shortly after
 11 becoming aware of Apple's preliminary constructions in early August, and informed Apple that it
 12 intended to amend its contentions to assert DOE if the court adopted certain of Apple's constructions
 13 just *three days* after Apple's constructions were finalized in the parties JCC Statement on August 28,
 14 2023. ECF No. 92; ECF No. 103-7. In *Word to Info*, which Apple relies on, the court found lack of
 15 diligence because the party chose to wait until after the final claim construction order to even begin
 16 investigating whether it could formulate infringement contentions, noting that the party could have
 17 instead taken other steps that would have helped demonstrate diligence *such as reaching out to the*
 18 *opposing party after submission of the joint claim construction statement to inform them that they would*
 19 *be amending if certain construction were adopted*, just like MPH did here. *Word to Info, Inc. v.*
 20 *Facebook Inc.*, 2016 WL 6276956, at *6 (N.D. Cal. Oct. 27, 2016); *see also THX, Ltd. v. Apple, Inc.*,
 21 2016 WL 178137, at *2 (N.D. Cal. Apr. 29, 2016) (finding Apple was diligent in seeking leave to amend
 22 invalidity contentions by promptly notifying plaintiff of its intent to amend and filing motion *within*
 23 *five months* of receiving the first relevant documents prompting the amendment).

24 After informing Apple of its intent to amend on September 1, 2023, MPH revised and provided
 25 its infringement contentions to add DOE contentions only 70 days after Apple requested it on
 26 September 12, 2023, ECF Nos. 103-8, 103-15, doing so all while preparing its opening and reply claim
 27 construction briefs due on October 12, 2023 and November 16, 2023, *see* ECF Nos. 83, 95, 99, as well
 28 as attending to numerous other discovery matters. *See* Mitchell Decl. at ¶¶ 3–7.

1 The claims and technology here are highly technical, and the complexity of the
 2 telecommunication systems at issue required significant time and resources to analyze to prepare
 3 contentions. MPH acted with diligence to assess its infringement positions under the DOE within a few
 4 months of learning of Apple's initially proposed construction across the *five* '949 family patents,
 5 including by completing relevant legal research and analysis, and having its technical expert analyze
 6 and review technical materials produced by Apple. *See id.* at ¶¶ 3, 5. In fact, the few months MPH took
 7 to prepare its amended infringement contentions under DOE, if anything, show good faith diligence
 8 and thoroughness in assessing and preparing such contentions. Moreover, Apple's argument is further
 9 belied by its changing of its own construction of "intermediate computer" in its responsive brief on
 10 November 2, 2023 as MPH would have been able to serve its proposed amended infringement
 11 contentions earlier. *Id.* at ¶ 6. MPH promptly revised its DOE theories based on Apple's changed
 12 position, and served them on Apple within three weeks. *Id.* at ¶¶ 6–7. After Apple indicated its
 13 opposition on November 29, 2023, ECF No. 103-16, MPH filed its motion only days later. ECF No.
 14 103.

15 This timeline demonstrates diligence, particularly considering the number of patent claims at
 16 issue that needed to be analyzed and addressed, and the complexity of the technology. Apple has cited
 17 no case where a Court denied a motion to amend on similar facts. *Word to Info*, 2016 WL 6276956, at
 18 *6 ("Diligence determinations are necessarily fact intensive inquiries and must be determined based on
 19 the individual facts of each case."). Whether the Court decides to measure MPH's diligence from the
 20 Patent L.R. 4-2 disclosure, Patent L.R. 4-3 disclosure, or the filing of Apple's Responsive Claim
 21 Construction Brief, MPH was diligent in serving its proposed amended contentions on Apple by
 22 November 21, 2023, less than *three weeks* after receiving Apple's responsive claim construction brief,
 23 and just over three months from receiving its preliminary claim construction positions.

24 V. APPLE'S CLAIMS OF PREJUDICE LACK MERIT

25 A. The Court Can Grant Leave to Amend When No Prejudice Exists

26 Courts have allowed a party, including Apple, to amend its contentions based solely on a lack
 27 of prejudice to the non-moving party, regardless of diligence, including "when the movant made an
 28 honest mistake, the request to amend did not appear to be motivated by gamesmanship, or where there

1 was still ample time left in discovery.” *Apple Inc. v. Samsung Elecs. Corp.*, 2012 WL 5632618, at *5
 2 (N.D. Cal. Nov. 15, 2012); *Karl Storz*, 2016 WL 2855260, at *3 (“[T]he court retains discretion to grant
 3 leave to amend even in the absence of diligence so long as there is no prejudice to the opposing party”).
 4 A court found prejudice minimal where “little discovery had occurred.” *Opticurrent, LLC v. Power*
 5 *Integrations, Inc.*, 2017 WL 11392680, at *7 (N.D. Cal. Oct. 3, 2017). “Prejudice is typically found
 6 when amending contentions stand [sic] to disrupt the case schedule or other court orders.” *Karl Storz*,
 7 2016 WL 2855260, at *3.

8 Here, MPH served Apple with its proposed amendments ten months before the close of
 9 discovery. No party depositions had taken place, and no party depositions have been scheduled in the
 10 two months since then. MPH’s amendments would have no effect on the case schedule, as the next
 11 scheduled date is the close of fact discovery, still eight months away. “Accordingly, the Patent Local
 12 Rules concern with parties sandbagging opponents late in the discovery period is not at issue.” *Tech.*
 13 *Licensing Corp. v. Blackmagic Design Pty Ltd.*, 2014 WL 5499511, at *3 (N.D. Cal. Oct. 30, 2014)
 14 (cleaned up). Further, the timing of these amendments are not the result of gamesmanship. MPH moved
 15 diligently to analyze Apple’s claim constructions and its document production to prepare DOE theories
 16 for these complex devices and systems as promptly as it could. With ample time left in discovery, this
 17 Court should find that Apple would not be prejudiced by giving leave for MPH to amend.

18 **B. Apple’s Prejudice Argument Nullifies Patent Local Rule 3-6**

19 Apple claims prejudice arising from the timing of MPH’s proposed amendments relative to the
 20 claim construction briefing. But Apple’s alleged prejudice is flatly contradicted by the rule supporting
 21 good cause for amendment *after* the Court adopts a construction different than the party seeking
 22 amendment. *See* Patent L.R. 3-6(a). If Apple’s alleged prejudice was sufficient to bar amended
 23 infringement contentions, then amendment would *never* be allowed after the claim construction order,
 24 or even after the JCC Statement. That can’t be true given that the Court’s adoption of constructions
 25 different from the party seeking amendment may provide good cause. *Id.*; *see, e.g.*, *Tech. Props. Ltd.*,
 26 2016 WL 1360756, at *4 (no prejudice where party moved to amend a month *after* *Markman* order).

27 MPH promptly put Apple on notice that it would supplement its contentions to add DOE to
 28 address Apple’s proposed constructions *before* any claim construction briefs were filed, and served

1 Apple with a draft of the amendments weeks before the *Markman* hearing. *Cf. Vasudevan*, 2011 WL
 2 940263, at *3 (no prejudice where motion filed after claim construction briefing *and* hearing). If Apple
 3 truly felt that MPH's proposed amendments would affect claim construction or prejudice Apple, it
 4 could have requested supplemental briefing, made additional arguments during the hearing, proposed
 5 revised constructions, or requested additional constructions. *See id.* (noting court could issue
 6 supplemental claim construction order if necessary based on amendments); *Asetek Danmark A/S*, 2020
 7 WL 6562319, at *5 (no prejudice to opposing party based on claim construction).

8 The fact that Apple had filed its responsive brief before MPH provided its amended contentions
 9 did not deter Apple from serving supplemental case law over the weekend immediately before the
 10 *Markman* hearing. Mitchell Decl. at ¶¶ 10–12; Ex. E, Dec. 8, 2023 email from Apple; Ex. F, Dec. 9,
 11 2023 email from Apple. In fact, MPH had expressed its intent to raise its motion for leave at the
 12 December 11 *Markman* hearing, but Apple insisted that the parties file a stipulation prior to the hearing
 13 to delay the remaining briefing schedule by a month. *See* Ex. D, Dec. 4–7, 2023 email exchange. After
 14 waiting a month after the claim construction hearing, Apple now objects to MPH's amendments on the
 15 basis of prejudicing Apple's claim construction efforts. If MPH's amendments were truly prejudicial
 16 as Apple claims, then it could have addressed them while claim construction was still pending.

17 The three cases cited by Apple don't support that amending infringement contentions after claim
 18 construction prejudices Apple here. In *Advanced Micro*, the court denied the plaintiff's motion for leave
 19 to amend its infringement contentions to include indirect infringement theories filed *after* the claim
 20 construction order issued, and years after the parties' exchanged their proposed constructions.
 21 *Advanced Micro Devices, Inc. v. LG Elecs., Inc.*, 2017 WL 2774339, at *7 (N.D. Cal. June 26, 2017).
 22 Here, MPH informed Apple of its intention to amend its contentions before any briefs were filed and
 23 before claim construction proceedings had concluded. In *Karl Storz*, the court denied plaintiff's motion
 24 for leave to add new infringement theories *after claim construction had concluded*, and did so because
 25 plaintiff had notice of defendant's constructions for **20 months** before moving for leave. *Karl Storz*,
 26 2016 WL 7386136, at *5–6. There are no such facts in this case.

27 In *Dynetix*, the court denied plaintiff's motion to add a new claim of infringement against a
 28 *new product, after claim construction had concluded*. *Dynetix Design Solutions Inc. v. Synopsys Inc.*,

1 2012 WL 6019898, at *3 (N.D. Cal. Dec. 3, 2012). The defendant had selected terms for construction
 2 without knowing that one of their separate products would later be accused. Here, MPH’s DOE theories
 3 are asserted against the same functionalities in Apple’s devices, software, and server systems.

4 **C. Apple’s Vague Assertions of Prejudice are Insufficient for Denying MPH’s Motion**

5 Apple does not say how MPH’s proposed amendments would have changed its claim
 6 construction strategy, had Apple known about them sooner. Apple vaguely asserts that it would have
 7 “pressed prosecution history-related arguments more in its briefing,” but Apple already focused on the
 8 prosecution history where it wanted. *See, e.g.*, ECF No. 98 at pp. 10, 12. Apple also doesn’t say what
 9 other terms it would have proposed for construction. Courts typically find such vague assertions
 10 insufficient as prejudice. *Finjan, Inc. v. Symantec Corp.*, 2017 WL 4025219, at *2–4 (N.D. Cal. Sept.
 11 13, 2017); *Illumina Inc. v. BGI Genomics Co.*, 2021 WL 2400941, at *7 (N.D. Cal. June 11, 2021).

12 Apple similarly complains that MPH’s amendments would lead to additional work for Apple
 13 because it “would need to reassess its non-infringement positions and search for art that MPH’s new
 14 DOE theories might ensnare.” But “extra work alone does not support a finding of prejudice.” *Impinj*,
 15 2022 WL 2125133, at *2. Moreover, Apple’s assertion exaggerates any possible expansion of the scope
 16 of the case. First, Apple received a draft of MPH’s amended contentions in November 2023 and, since
 17 then, has not served any discovery requests directed to those theories or indicated that it intended to
 18 seek leave to amend its invalidity contentions to assert new art. Second, Apple is legally estopped from
 19 asserting new prior art-based invalidity grounds for the majority of patents in suit that it reasonably
 20 could have raised during the IPRs. 35 U.S.C. § 315(e)(2); *see also Asetek Danmark A/S v. CoolIT Sys.*
 21 *Inc.*, 2019 WL 7589209, at *5–10 (N.D. Cal. Dec. 30, 2019). Finally, it is unclear what prior art Apple
 22 would need to search for to address MPH’s new DOE theories since Apple has already asserted ample
 23 references that don’t disclose the claim terms at issue as construed, including prior art that has nothing
 24 to do with “IPSec” or “one or more SPI values.” *See, e.g.*, Ex. L, Ex. M, Ex. N. Accordingly, Apple’s
 25 alleged prejudice based on the doctrine of ensnarement has no merit.

26 **VI. CONCLUSION**

27 For the foregoing reasons, the Court should grant MPH’s motion for leave to amend, including
 28 MPH’s unopposed request to include recently-released Apple products. *See* ECF No. 110, p. 14 n. 5.

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2

Respectfully Submitted,

3 /s/ James D. Mitchell
4

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28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 23, 2024 the foregoing:

MPH TECHNOLOGIES OY'S REPLY IN SUPPORT OF PARTIALLY AGREED MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS

was served via electronic transmission on the following counsel of record.

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